

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**





77-1062

To be argued by  
PETER SHERMAN

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :

Appellee, :

- against - :

Docket No. 77-1100

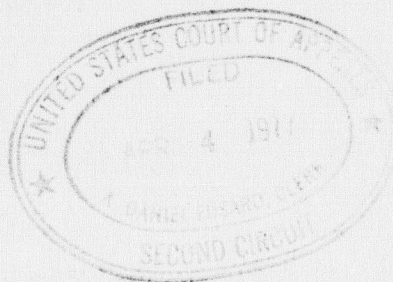
GINO REDA and LOUIS REDA :

Defendant-Appellant. :

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ON APPEAL FROM A JUDGMENT  
OF THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLANT LOUIS REDA



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In the  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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Docket No. 77-1100

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UNITED STATES OF AMERICA,

Appellee,

- against -

GINO REDA and LOUIS REDA,

Defendants-Appellants.

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DEFENDANT-APPELLANT LOUIS REDA'S BRIEF

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STATEMENT

Defendant-appellant Louis Reda appeals from a judgment of the United States District Court for the Southern District of New York, rendered on the 16th day of February, 1977, convicting him under Counts One and Four of the indictment of violations of Title 21 U.S.C. 812, 841(a)(1), 841(b)(1)(A) and 846 after trial Steward J., and a jury.

The appellant, Louis Reda had also been under Counts Two and Three indicted for violations of Title 21 U.S.C. 812, 841(a)(1) and 841(b)(1)(A). The jury however, acquitted appellant

of Counts Two and Three.

Louis Reda was sentenced to 2 years imprisonment with a provision that he be placed in a jail type institution for a period of 4 months. Execution of the remainder of the sentence was suspended and he was placed on probation for 20 months. Additionally pursuant to Title 21 U.S.C. § 841(b)(1)(A) appellant was placed on special parole for 3 years. The sentence imposed on Counts One and Four are to run concurrently with each other. The period of probation and special parole are also to run concurrently with each other.

Louis Reda is presently at liberty pending the determination of this appeal.

Peter Sherman, was continued as counsel on appeal, pursuant to the Criminal Justice Act.

#### QUESTIONS PRESENTED

I. Whether the evidence against appellant was insufficient as a matter of law and should not have been submitted to the jury?

II. Whether the Government's bringing the marijuana found in appellant's home before the jury was highly prejudicial and constituted reversible error?

#### THE EVIDENCE

On March 2 or 3, 1976, John Tufo and Gino Reda met at the Famous Diner in the Bronx and discussed the possibility of



obtaining cocaine or marijuana for resale in the New York Area (58-59). Unbeknown to Gino Reda, Mr. Tufo had come to the conclusion that he was previously sent to jail as a result of information supplied by Gino Reda. Mr. Tufo, on his own, initiated a plan to put Gino Reda in contact with the federal drug authorities so that Gino Reda would be jailed and Mr. Tufo's revenge would be complete (153-54).

On July 8, 1976, Mr. Tufo went to the offices of the Drug Enforcement Administration and began cooperating with the Government in order to "get" Gino Reda (62-63). A phone call was placed to Gino Reda's home in Florida on July 23, 1976 in which Mr. Tufo again spoke with Gino Reda concerning the possibility of bringing drugs from Florida to New York. Gino Reda flew to New York that evening and was met at the airport by Mr. Tufo (71). Also at the airport were Agents Reape and Fernandez who came to observe the meeting. Gino Reda carried a black attache case (258). Again, according to Tufo, they had a conversation concerning bringing narcotics from Florida to New York. Tufo drove Gino Reda to 1910 Hone Avenue in the Bronx and then left. The above address is that of appellant Louis Reda, Gino Reda's son.

Gino Reda called Tufo on July 31, 1976 and inquired if he knew anyone who would be interested in buying an ounce of cocaine (74). Tufo, interested in getting Gino Reda on something



bigger than an ounce, called him back and said he could not find any buyers.

On August 18, 1976, Tufo following the instructions of the agents, called Gino Reda and told him that he was in contact with people who were interested in purchasing large amounts of cocaine. A meeting was arranged at the Castle Hill Diner (77). About fifteen minutes after the call, Gino Reda went to the diner. He was introduced to Agent Fernandez as Danny and to Agent Reape as John (78). Agent Fernandez explained that he was interested in purchasing cocaine. Gino Reda said that he would be able to supply between one and fifty pounds of cocaine which would cost \$24,800 per pound subject to a confirmation of the price from the source of the cocaine, who was located in Florida (274-75). Upon being asked when he could supply the cocaine, Gino Reda stated that he would have to get in touch with his Florida source. Additionally, Gino Reda claimed that he would transfer only one pound at a time. When the agents proposed that four pounds be transferred at once, Gino Reda again said he would propose the arrangement to his Florida source (277).

Gino Reda then explained that he was also in the marijuana business in Florida and could supply "bulk" amounts to the agents if they desired it (273). Agent Fernandez informed Gino Reda that they were definitely interested in buying the



four pounds of cocaine and he should get in touch with his Florida source (280).

Upon leaving the diner, Gino Reda instructed the agents to take the phone numbers of the pay phone and to call him at that number at 7:30 o'clock for answers to their questions (286). Agent Fernandez called the pay phone at the agreed time and Gino Reda confirmed that he could do business with them.

On August 23, 1976, Mr. Tufo called Gino Reda at Louis Reda's home. Tufo and Gino arranged to meet at Louis Reda's apartment (83). Gino and Louis Reda were at home when Tufo arrived. Louis Reda was sitting at the kitchen table reading the Racing Form when Gino Reda and Mr. Tufo began talking about calling the agents (86). Gino Reda took a brown box off the kitchen shelf, opened it, and took out three glassine envelopes containing cocaine. He placed the envelopes into a black attache case and called Agent Reape (86-89).

During the time that Tufo was in the apartment, Louis Reda sat at the kitchen table reading the Racing Form (99). Louis Reda did not participate in the conversation nor did he speak on the telephone. Nothing was said between Tufo and Louis Reda (117-118).

The following day, August 24, Tufo picked up Gino Reda and drove him to the Castle Hill Diner. A meeting had been arranged between the agents, Tufo and Gino Reda for the purpose of first



giving the agents a sample and then, if the sample was acceptable, transferring the bulk of the cocaine. Gino Reda arrived at the diner but had Tufo drive him home after the agents did not appear on time (101). Tufo went back to the diner and met the agents who, after some convincing, had Tufo call Gino Reda back to the diner (102).

Gino Reda returned to the diner alone in a 1969 green over white Cadillac. He parked in the rear of the diner and motioned for Tufo to come over to the car (102). Tufo approached the car, whereupon Gino Reda gave him a Marlboro box which, when opened, contained a small amount of cocaine (103,223,325,519).

According to Tufo, two or three minutes after he gave the Marlboro box to Agent Fernandez, a yellow 1968 Cadillac driven by Louis Reda passed by the diner (123). Tufo commented to the agents that Louis Reda was driving by but testified that he observed nothing unusual about the way the car passed him (123-24 and 326). Agent Fernandez testified that a few minutes after he received the Marlboro box from Tufo, Louis Reda drove by as follows: He was driving at about twenty-five to thirty miles per hour, however, as he passed by the diner he slowed down to five miles per hour, leaned over so that he could take a good look at them and then speed up to his original speed and left the area (401-2). When confronted with the difference between the conspicuous act that he described and the inconspicuous



act Mr. Tufo described, Agent Fernandez stuck to his story (402). Agent Reape testified that Louis Reda drove by the diner about fifteen or twenty minutes after Tufo returned with the Marlboro box (562-3).

Later that day, at 3:30 in the afternoon, Gino Reda called the diner to find out if the agents were satisfied with the sample. The agents stated they were and Gino Reda agreed to come back to the diner. He returned alone to make arrangements for the deliver (330-32). Agent Fernandez was wearing a Kell recording device and a tape recording (Exhibit 18) and transcript (Exhibit 18A) were used in the court room. After asking how they liked the sample, Gino Reda says:

Gino: I've got a suggestion, I don't know whether, whether, uh it will suit you or not. I think I've put myself as far up as I possibly can. I don't live here. I live in Florida. But I've got my family here. I got my wife in Pelham Bay and I've got my son, he's got his wife and three kids (inaudible) go to his house.

Fernandez: Uh---

Gino: He's got his wife there, he has the three kids there and there's whoever...If you want, they can vacate or they'll disappear before anything happens. I'll send them out (Appendix A-101-02)

As Agent Fernandez hesitated about the idea of going to Louis Reda's house, Gino Reda proposed a second method of consummating the transfer involving someone coming to Louis' house to "clarify it" and then Gino Reda would walk it wherever they



wanted and then he would be paid in Louis' house. (Appendix A102)

Only after the agents rejected these methods of transfer did Gino Reda suggest that one of the agents sit downstairs with the money and if the other agent approved of the cocaine his son Louis Reda would take the agent back to the car, the agent would pick up the cash and come back to transfer the money for the cocaine. This proposal was also rejected by the agents.

Essentially, an impasse was reached; the agents did not want to go to Louis Reda's apartment, and Gino Reda did not want to do his business on the street (334-35). Agent Fernandez suggested going to a bar to talk it over, which was done. Eventually an agreement was reached in which Gino Reda would transfer the drugs in front of a church near the Castle Hill Diner (335).

Gino Reda left and came back alone at 4:30 o'clock. He told the agents that he was having a problem receiving permission from his source to release the cocaine to them. He left and came back by himself twenty minutes later. This time, he suggested that John Tufo be the intermediary between himself and the agents (336-337).

Agent Fernandez testified that Gino Reda claimed he had become very nervous; therefore, he wanted to have "eyes" to protect his interests. Fernandez claimed that Louis Reda was to be the eyes (337). The only reference to "eyes on the tape



does not support Agent Fernandez's testimony:

Gino: I rather hold. I rather hold until he comes back. I tell you why. Because my skepticism is going to make tell my son to follow me, and if I do that, it's going to put eyes where they're not supposed to be. Uh, I'm not reluctant, like I said, (inaudible) come up to the house, inaudible.  
(Appendix, A-103)

Gino Reda left and returned, again alone, and said he was unable to release the cocaine. He did however, inquire if they were interested in any marijuana (339).

Louis Reda never met the agents throughout the prolonged negotiations.

#### SURVEILLANCES

On August 24, 1976 Drug Enforcement Administration Agents Logan and Korniloff were assigned to surveil Louis Reda's home at 1910 Hone Avenue, Bronx, New York.

Agent Logan testified that he saw Gino Reda enter and leave the house several times (681-3). On one of these occasions he observed Gino Reda enter 1910 Hone Avenue and, a short time later leave the apartment house accompanied by his son, Louis Reda. Gino Reda carried a black attache case to Louis Reda's yellow car. They went to the rear of the car, opened up the trunk and when the trunk was closed the attache case was gone (682-3).

Contrary to Agent Logan, Agent Korniloff stated that it was Louis Reda, not Gino Reda, who carried the black attache case (700).



Both Logan and Korniloff testified that Louis Reda did not open the attache case (689 and 703).

After the attache case was placed in the trunk Louis Reda, in his car, and Gino Reda, in his car, drove to the corner made right turns, went up the block and made U-turns (682). Louis Reda parked his car in a gas station and was driven home by his father.

There was no testimony as to what was inside the brief case at that particular time.

#### ARRESTS AND SEIZURES

On August 25, 1976, the day after the aborted transfer, Mr. Tufo called Gino Reda. Gino Reda explained that he didn't want to go through with the sale because "he was afraid there was going to be a rip off." (107) Gino Reda explained that he would try to get rid of the cocaine in Boston and if that failed, he would send it back to Florida via the Eastern Airlines Sprint delivery system (107-9).

The following morning Gino Reda drove to LaGuardia Airport. Agent Kennedy testified that he placed Gino Reda under arrest at the airport and seized a set of keys and the box he was carrying under his arm (663). The box was found to contain a quantity of cocaine, money, and two handwritten notes. A stipulation was entered into admitting that the notes were written by Gino Reda (724).



Agent Fernandez, who was at the airport, was given the key ring by another agent (351). Thereafter, he went to the vicinity of 1910 Hone Avenue and placed Luis Reda under arrest. Louis Reda was brought back to his apartment whereupon a search began.

Agent Fernandez removed a black attache case from the hall closet. The attache case was identified by John Tufo as belonging to Gino Reda (119-20). The attache case was locked, however Agent Fernandez opened it with the key previously found in Gino Reda's possession (370-71). A plastic bag containing cocaine along with plane tickets to Bogota for Gino Reda and Dolores Bischoff were found in the attache case. Several agents conducted a complete search of the house, however, the only key ever recovered that could open the attache case was the one found in Gino Reda's possession (625).

The agents seized a scale in a brown paper bag and a mat underneath it from the top of the refrigerator (618) and also seized the contents of a vacuum cleaner bag. Mr. Barbatta, a chemist with D.E.A. testified that he examined the above three items and determined that there was no trace of cocaine in them (440-43).

The only cocaine found in the apartment was in the locked brief case.

Also seized was a jar of lactose from the kitchen cabinet, (554), an address directory and a telephone address book (552).



The telephone address book belonged to Gino Reda, according to the information Agent Reape obtained from Louis Reda's wife (591).

In response to questions about the evidence in the house, Louis Reda stated he did not know how it got there (553).

Louis Reda did not call any witnesses on his behalf.

#### MOTIONS

At the close of the Government's case, defense counsel made a motion for a judgment of acquittal. The Court denied the motion (741). The motion was renewed after both sides rested and was denied. After the verdict was returned convicting Louis Reda of Counts One and Four the motion was made again and was denied.

#### PREJUDICE BY THE GOVERNMENT

Immediately prior to and during the course of the trial, the Government sought to introduce evidence of Louis Reda's alleged prior dealings with his father concerning selling marijuana. The Court ruled that no evidence concerning marijuana dealings in Florida, a notebook, and a small amount of marijuana found in Louis Reda's apartment would be received in evidence at the trial, (269).

It should be noted that there was substantial testimony concerning Gino Reda's desire to sell marijuana to the agents (59, 72-3, 277-78, 280 and 534).

In contravention of the Order of the Court, Agent Fernandez,



in direct examination testified: "Shortly thereafter, Special Agent Michael O'Conner located some additional drugs in the apartment -- " (Appendix A-108). An immediate objection was taken which the Court sustained. At the side bar a motion for a mistrial was made and denied, however the Court struck the reference to other drugs and gave a curative instruction to the jury to disregard the comment by Agent Fernandez (372-74).

Shortly thereafter, Agent Fernandez' testimony was interrupted in order to allow Joseph Barbatto, the chemist, to testify. On redirect, the prosecuting attorney asked the following question: "Now, did you also conduct a number of examinations on marijuana with respect to this case?" (Appendix, A-105) Again, an immediate objection was taken to the question. The Court inquired as to the reason for asking the question. The attorney for the Government claimed defense counsel had "opened the door." The Court stated: "No, you shouldn't have done that, Mr. Virella. It was improper." (Appendix, A-105) Counsel for Louis Reda moved for a mistrial. The Court sustained the objection, but denied the mistrial motion (444).

POINT I

THE EVIDENCE AGAINST APPELLANT  
WAS INSUFFICIENT AS A MATTER OF  
LAW AND SHOULD NOT HAVE BEEN  
SUBMITTED TO THE JURY.

Before the Court may submit a criminal case to a jury, there must first be a determination as to whether the evidence



in its entirety would permit a reasonable person to conclude that the defendant was guilty beyond a reasonable doubt. United States v. Wiley, 519 F.2d 1348 (2Cir., 1975); United States v. Taylor, 464 F.2d 240 (2Cir., 1972); and United States v. DeGarcia, 518 F.2d 1156 (2Cir., 1975).

We submit that putting aside conjecture, speculation and suspicion, a fair reading of the trial record fails to disclose that quantum of evidence of a nature which may honestly be said to be convincing beyond a reasonable doubt that Louis Reda knowingly participated in an unlawful conspiracy and possessed cocaine.

Beginning with the first communication on March 2nd or 3rd and continuing throughout the negotiations John Tufo, the informant, discussed the proposed drug dealings only with Gino Reda. The July 23, 1976 phone call was made to Gino Reda in Florida and not to Louis Reda in New York (71).

While the phone calls from Tufo solely to Gino Reda may be attributed to Tufo's desire for retribution against Gino and not Louis; the events of the first meeting on August 18, 1976 indicate a lack of participation on the part of Louis Reda. Gino Reda met with Tufo and the agents at the Castle Hill Diner by himself. It was during the course of this meeting that the critical questions with respect to the possible narcotics deal were broached: Namely substance, price, quantity and delivery



(274-75). According to Tufo and the agents, Gino Reda made it quite clear that he was not alone in his trade; his source was in Florida and would have to be contacted to confirm the arrangements (274-77).

The evidence is undisputed that Gino Reda lived in Florida (111) and when he came to New York, he would stay with his son Louis Reda.

After the August 18, 1976 meeting, the framework for the sale was set and Gino Reda, true to his word, called the agents at the Castle Hill Diner's pay phone to confirm that he could do business with them (296). Although the agents gave him their phone number, Gino Reda never gave them Louis' number. In fact, when Agent Fernandez called Louis Reda on August 26, the day of the arrests, to ascertain if he would be home, Agent Fernandez posed as an insurance salesman rather than as Danny, the person who had been with his father just the other day (369-70).

The August 23, 1976 meeting at Louis Reda's house similarly leads to the conclusion that Louis Reda was not participating in his father's scheme. John Tufo testified that Louis Reda was sitting at the kitchen table reading the Racing Form while he and Gino Reda were discussing the proposed call to the agents and looking at the cocaine (86-69). Tufo, the only witness with intimate knowledge of the Redas and the other co-conspirators in the case, unequivocally stated that Louis Reda did not

participate in the slightest in any of the discussions during the August 18 meeting (118).

During cross-examination, Tufo was asked and he answered as follows:

Q. Now, Mr. Tufo, as far as you know, Gino Reda was in this thing solely by himself and with no one else except you, Agents Reape and Fernandez; is that correct?

A. That's correct.

Q. Louis Reda was not involved; is that correct?

A. Not to my knowledge. (Appendix, A 106-7)

Mr. Tufo stated that he was under the protective custody of the Government. He admitted that he was dependent upon the Government for his sustenance (238-39). Clearly John Tufo had every reason to support the Government's contention that Louis Reda was a knowing participant in the conspiracy. In spite of this, he candidly admitted that Louis Reda was not involved.

On August 24, 1976, Gino Reda first met the agents with the intention of giving them a sample of cocaine and then transferring the rest of it (102). Louis Reda was not present when the cocaine was transferred (103, 223, 325, 519). There is however, testimony, that Louis Reda drove by the diner after Tufo gave the sample to one of the agents.

There are three versions concerning the manner in which Louis Reda drove by the diner. Mr. Tufo testified that Louis



Reda drove by only two or three minutes after the Marlboro box was given to the agents (123). Tufo saw nothing unusual in the way Louis drove by the diner (123-24). On the other hand, Agent Fernandez testified that a few minutes after he received the Marlboro box, Louis Reda drove by rather slowly, leaned over, and looked at him then sped up and drove away. Agent Reape testified similarly to Fernandez but claimed it occurred fifteen or twenty minutes later than Fernandez said (562-63).

This bit of evidence was one of the major factors which the Government claimed indicated a knowing participation in the conspiracy on the part of Louis Reda. We are mindful that on appeal the evidence and all reasonable inferences that may be drawn from the evidence should be drawn in the light most favorable to the Government. Glasser v. United States, 315 U.S. 60 (1942). However, in view of the undisputed facts that Louis Reda knew John Tufo since his childhood (124), that the Castle Hill Diner is only minutes from his home (122) and that he drove by in mid-afternoon, this type of evidence gives rise to no more than speculation that he drove his car past the diner in furtherance of the conspiracy.

On the same day, August 24, 1976 at 3:30 in the afternoon, Gino Reda called the agents to make arrangements for the delivery (330-32). Upon returning to the vicinity of the diner, negotiations for the delivery were begun. Again Louis Reda was not



present. In fact, the first time Louis Reda ever met any of the agents was at the time of his arrest. Fortunately, we are aided by a tape recording of Gino's conversations with the agents at this time (tape Exhibit 18 and transcript Exhibit 18A). Gino Reda explained to the officer that he lived in Florida but his son, his son's wife and children lived close by. He suggested that the deal be transacted in his son's apartment and when Agent Fernandez hesitates Gino says:

Gino: He's got his wife there, he has three kids there and there's whoever...If you want, they can vacate or they'll disappear before anything happens. I'll send them out. (Appendix, A101-2) (Emphasis added)

The above was Gino Reda's first suggestion as to transfer. The only fair reading or, for that matter, listening, to the conversation indicates that Gino Reda did not want his son Louis Reda involved.

Admittedly, after the agents rejected Gino Reda's first two proposals, Gino, out of Louis' presence, suggested that his son participate in the transfer. It is undisputed that Louis never agreed to participate in Gino Reda's proposals.

After leaving the agents and returning alone three times, Gino Reda was supposed to come back with the cocaine and the transfer was to take place in front a church near the Castle Hill Diner (335). Instead of bringing the cocaine, Gino suggested that Mr. Tufo be the intermediary between himself and



the agents (336-337).

Gino Reda claimed he was nervous. Agent Fernandez testified that Gino wanted "eyes" to protect him and that Louis Reda was to be the eyes (337). Again, we are aided by the tape recording (Exhibit 18 and transcript 18A). Gino Reda claimed that his "skepticism" of the agents was going to force him to tell his son to follow him "...and if I do that, it's going to put eyes where they're not supposed to be." (Appendix, A-103)

Clearly, Gino Reda's taped statements indicate that Louis Reda was not a part of his business. It should be noted that Gino did not hesitate and in fact suggested that John Tufo be present thus vitiating the argument that Gino Reda wanted to consummate the transaction alone.

Gino Reda returned to the agents a fourth and last time to inform them that his Florida source would not permit a release of the drugs (339).

The surveilling Agents, Logan and Korniloff, both testified that a black attache case was placed in the trunk of Louis' car on one of the occasions that Gino Reda left 1910 Hone Avenue, (682-3 and 700). Agent Logan stated that Gino Reda carried the case (682-3) while Agent Korniloff claimed that Louis Reda carried it (700).

From the fact that the attache case was placed in Louis Reda's car trunk, the Government would then have us speculate



not only that there was cocaine in the case but also that Louis Reda knew there was cocaine in the case. This is so in spite of the fact that both agents testified that Louis Reda did not open the case (689 and 703).

The following day Gino Reda explained to John Tufo that he didn't go through with the sale for fear of a "rip off" and Gino was either getting rid of the cocaine in Boston or sending it back to Florida (107-9). Again, there was no indication that Louis had any part in Gino's dealings.

On August 26, 1976, Gino Reda was arrested at LaGuardia Airport in possession of a brown box containing cocaine and a key ring (663).

Agent Fernandez took the keys, arrested Louis Reda and pursuant to a search warrant, began a search of Louis Reda's apartment. A locked black attache case was seized from the hall closet (119-120). The only key found to open the attache case was the one found in the possession of Gino Reda (625). Additionally John Tufo testified that the black attache case was Gino Reda's (120) and that Gino brought the case from Florida, (258). Upon opening the suitcase a plastic bag containing cocaine (the possession of which Louis Reda was convicted) was found along with airline tickets for Gino Reda and Delores Bischoff for Bogota (382).

Among the items also seized were two scales (374-376), a



jar of lactose from the kitchen cabinet (551), a telephone address book (552), and a rolodex type address directory (552). The rolodex contained Dolores Bischoff's name and address. Ms. Bischoff was purportedly a co-conspirator however, it was ascertained that she was Gino Reda's girlfriend (604). The address book, according to Louis Reda's wife belonged to Gino Reda (591). Louis Reda denied knowing how the evidence came into the house.

We submit that the evidence introduced against Louis Reda consisted entirely of inferences based upon nonexistent and therefore insufficient evidence. United States v. Rappaport, 312 F.2d 502 (2Cir., 1963). While the evidence presented need not be direct i.e. circumstantial evidence may be sufficient, there must be some solid evidence that the defendant actually knew of the conspiracy and participated in furtherance of it. The jury may not be permitted to engage in pure speculation United States v. Taylor, supra.

The conviction for possession of the cocaine found in Gino Reda's locked attache case is contrary to the evidence presented. Had Louis Reda maintained some custody or control over the case, he would have had access to the contents of the case. Furthermore, a father may stay at his son's house without his son first inspecting his possessions, The mere association of Louis Reda with Gino Reda is insufficient to sustain a conviction



United States v. Kompinski, 373 F.2d 429 (2Cir., 1967).

Knowledge of the existence of a conspiracy or attendance of a meeting may not be sufficient evidence to constitute one a party to that conspiracy. United States v. Sisca, 503 F.2d 1337 (2Cir., 1974) cert. den. 419 U. S. 1008 and United States v. Potash, 118 F.2d 54 (2Cir., 1947) cert. den. 313 U.S. 584 (1941).

A mere willing participation in acts with alleged co-conspirators, knowing in a general way that their intent was to break the law is insufficient to establish a conspiracy, United States v. Purin, 486 F2d 1363 (2Cir., 1973); United States v. Falcone, 109 F.2d. 579 (2Cir.) affirmed 311 U.S. 205 (1940) and United States v. Pioni, 100 F.2d 401 (2Cir., 1938)

A defendant may not be convicted unless his actions are knowing and wilfull and there is evidence of an agreement to engage in the unlawful activity, United States v. Marchese, 438 F.2d 452 (2Cir., 1971).

In United States v. Aviles, 274 F2d 179 (2Cir.), cert. den. 362 U. S. 974 (1960) this circuit enunciated what has come to be known as the "single act" or "single transaction" rule. The Court recognized that a single act might be sufficient to place a person within the confines of a conspiracy. However, seeing that conviction for a conspiracy requires intentional participation in the conspiracy the single act must be of such a nature that one could reasonably infer such intent. Id at p. 189.



In United States v. Aviles, supra., the defendant's conviction was overturned because the single purchase, although sufficient to prove participation, was insufficient to prove knowledge. See also United States v. DeNovia, 451 F.2d 979 (2d Cir., 1971) and United States v. Aqueci, 310 F.2d 817 (2Cir., 1962).

It is our contention that Louis Reda's acts show neither participation nor knowlege.

The "single act" or "single Transaction" rule has been logically extended to require a qualitative rather than a quantitative viewpoint to determine the sufficiency of evidence.

Thus to speak of a "single act" is misleading; rather it is the qualitative nature of the act or acts constituting the single transaction (purchase, delivery, or the like) viewed in the context of the entire conspiracy which will determine whether an inference can be drawn as to the actor's knowledge of the scope of the conspiracy. United States v. Torres, 503 F.2d 1120 (2Cir., 1974)

In United States v. Freie, 545 F.2d 1217 (9Cir., 1976) the Court states:

The "slight" evidence must be of the quality which will reasonably support a conclusion that the particular defendant in question wilfully participated in the unlawful plan with the intent to further some object or purpose of the conspiracy, Id at p. 1222

In the case at bar, we submit that while suspicion may be present even slight evidence is lacking to show appellant Louis Reda as a willful participant in the conspiracy.



POINT II

THE GOVERNMENTS  
BRINGING THE MARIJUANA FOUND IN  
APPELLANT'S HOME BEFORE THE JURY  
WAS HIGHLY PREJUDICIAL AND  
CONSTITUTED REVERSIBLE ERROR

During the course of the trial, there was substantial testimony concerning Gino Reda's desire to sell large amounts of marijuana to the agents (59, 72-3, 277-78, 280 and 534). Gino Reda claimed that he was able to deal in bulk quantities and was expecting a 250,000 pound shipment in the near future (273). Even when Gino Reda was backing out of the cocaine transfer because his Florida source would not allow him to go through with it, Gino continued to press for a marijuana deal with the agents (Appendix A-104).

Aside from the cocaine found in the attache case in Louis Reda's apartment, a small amount of marijuana was also seized. The Court unequivocally ruled that the marijuana seized from the apartment would be excluded from the trial (269).

Although the Court had already ruled on the marijuana question, Agent Fernandez testified: "Shortly thereafter, Special Agent Michael O'Conner located some additional drugs in the apartment -- " (372). The Court sustained the objection, denied a mistrial motion and gave a curative instruction to the jury to the satisfaction of defense counsel (372-74).

Had this been the extent of the prejudice to Louis Reda, we



would not, at this juncture, ask the Court to overturn the conviction on this ground. However, a short time after this statement by Agent Fernandez, the prosecuting attorney requested that Agent Fernandez' testimony be interrupted for the convenience of the D.E.A. chemist, Joseph Barbutto (425-26). All parties agreed and Mr. Barbutto began his testimony. On redirect, the prosecuting attorney asked the following question: "Now, did you also conduct a number of examination on marijuana with respect to this case?" (Appendix, A-105)

The prejudice to Louis Reda by the asking of this question is incalculable. Essentially, the prosecuting attorney impermissably introduced the suggestion that Louis Reda had participated in a specific act of criminal conduct not resulting in conviction, other than those acts with which he was charged. Thurmond v. United States, 316 F.2d 205 (9Cir., 1963).

In deciding the question of whether the error was serious enough to require a new trial certain factors are to be considered: The degree of prejudice to the defendant; the quality and forcefulness of the trial judges corrective action and the strength of the Government's case. United States v. Pfingst, 477 F.2d 177 (2Cir., 1973)

Given the fact that evidence of Gino Reda's proposed marijuana dealings was before the jury, it is quite likely that the jury inferred that the "drugs" Agent Fernandez found in the



house and the marijuana Mr. Barbatto examined were huge quantities ready to be sold. Furthermore, the mere possession of marijuana is illegal. Cautionary instructions will not cure this kind of prejudice and are of little, if any, effect.

Krulewitch v. United States, 336 U. S. 440, 453 (1949); United States v. Semenson, 421 F.2d 1206 (2Cir., 1970); United States v. Rinaldi, 301 F.2d 576 (2Cir., 1962) and Thurmon v. United States, supra.

Unlike United States v. Sawyer, 469 F.2d 453 (2Cir., 1972) it cannot be said that the introduction of the prejudicial evidence had only a marginal, prejudicial impact. In the case at bar, Louis Reda presented no witnesses on his behalf and the evidence against him was extremely slight at best.

While Agent Fernandez' testimony may be considered inadvertent, the prosecuting attorney's question was asked to Mr. Barbatto only a short time later. The Court denied the mistrial motion but stated "No. You shouldn't have done that Mr. Virella. It was improper." (Appendix, A-105)

We submit that the improper introduction of this type of criminal activity is grounds for overturning the conviction and granting a new trial. United States v. Rinaldi, supra.

#### CONCLUSION

The judgment of conviction should be reversed and the

indictment dismissed, or in the alternative, a new trial granted.

Respectfully submitted,

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LOUIS REDA







